Supreme Court, U. S.
FILED
JUL 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-1983

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

LOCAL 13889, UNITED STEELWORKERS OF AMERICA,
*Petitioner,*

v.

CHARLES W. SMITH, JOHN PASLEY AND RALPH SERINI,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
**To the United States Court of Appeals for the Eighth Circuit**

LOUIS GILDEN
722 Chestnut Street
St. Louis, Missouri 63101
*Attorney for Respondents*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## QUESTIONS PRESENTED

1. Whether the Appeals Court properly sustained the jury verdict against the Company and the Union, since the only instruction given by the trial court as to the liability of both the Company and the Union reflects with certainty that the jury reached its verdict solely on the resubmission proposition, an approved submissible issue for the jury.

2. Can petitioner Union obtain a new trial where the Union failed to make specific objections to respondents' instructions before the trial court as required by Fed.R.Civ.P. 51.

## LIST OF PARTIES TO THE PRECEEDING

Petitioner has failed to include Hussmann Refrigerator Company as a respondent in this proceeding or otherwise comply with Rule 19.6 of this Court, effective June 30, 1980 (Prior Rule 21.4).

Hussmann has by letter dated June 30, 1980, informed the Clerk of this Court that it does not intend to file a response to the petition or otherwise participate in the cause.

## TABLE OF CONTENTS


| | Page |
|---|---|
| 1. Questions Presented For Review | i |
| 2. List Of Parties To The Proceeding | i |
| 3. Table Of Contents | ii |
| 4. Table Of Authorities | ii |
| 5. Federal Rule Of Civil Procedure | 1 |
| 6. Statement Of The Case | 2 |
| 7. Summary Of Argument | 6 |
| 8. Reasons For Denying The Writ | 7 |
| 9. Conclusion | 12 |


### Table Of Authorities

#### Cases


| | |
|---|---|
| Beaver v. Taylor, 93 U.S. 46 (1876) | 11 |
| Lincoln v. Claflin, 74 U.S. (7 Wall.) 132 (1868) | 10 |
| McDermott v. Severe, 202 U.S. 600 (1906) | 11 |
| Mobile v. Montgomery Ry. Co. v. Jurey, 111 U.S. 584 (1884) | 10 |
| Norfolk & Western Ry. v. Earnest, 229 U.S. 114 (1913) | 11 |
| Palmer v. Hoffman, 318 U.S. 109 (1943) | 10,11 |
| Pennsylvania R.R. Co. v. Minds, 250 U.S. 368 (1919) | 11 |
| Pittman v. Littlefield, 438 F.2d 659 (1st Cir. 1971) | 9 |

**Rules**

Fed.R.Civ.P. 51 ..... i,1,10,11

Sup.Ct.R. 19.6 (1980) (former Sup.Ct.R. 21.4) ..... i

**Treatises**

9 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2558 (1971) ..... 9

# No. 79-1983

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

---

LOCAL 13889, UNITED STEELWORKERS OF AMERICA,
*Petitioner,*

v.

CHARLES W. SMITH, JOHN PASLEY AND RALPH SERINI,
*Respondents.*

---

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit**

---

### FEDERAL RULE OF CIVIL PROCEDURE

Fed.R.Civ.P. 51. *Instructions to Jury: Objection*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as

error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

## STATEMENT OF THE CASE

Respondents Smith, Pasley, and Serini are employees[1] who were selected by the Company's[2] foreman for the classification of maintenance pipefitter by reason of skill and ability after they bid and were interviewed by the foreman for the position (App. 7a)[3].

After their selection, the Union commenced processing four grievances by senior employees through the five-step grievance and arbitration procedure against the selection of respondents (App. 8a).

The matters occurring at the first arbitration hearing, although noteworthy, are not commented on here.

The arbitrator issued an award placing respondents in the maintenance pipefitter classification along with another employee and two of the grievants, making a total of six (App. 9a).

---

[1] This action was commenced by three employees, not four as alleged in petitioner's brief, p. 3.

[2] Local 13889, United Steelworkers of America is referred to in this brief as Union, and Hussmann Refrigerator Company is referred to as Company. Respondents are the employee plaintiffs; Hussmann was not made a respondent by petitioner.

[3] App. is Appendix to Petition For Writ of Certiorari filed by petitioner. Tr. is Transcript Of Proceedings, May 24, 1977.

After the award, Union and Company officials met and agreed privately to place four employees in the classification and not six, and agreed as to the names and place in classification of the four (App. 9a). Under this agreement two of the respondents, Smith and Serini, would be removed from classification and one, Pasley, would be placed in fourth position in classification with another grievance to be processed into arbitration against him (App. 9a, 10a).

Thereafter, officials of the Company and the Union met privately with the arbitrator to have the arbitration award changed without the presence of respondents or any representatives on their behalf, and they told the arbitrator which four employees should receive the positions pursuant to their previous meeting (App. 9a, 29a). No additional testimony was taken (App. 9a). The arbitrator rendered a second award in accordance with the agreement of the Union and the Company (App. 10a). Smith and Serini lost their classifications and Pasley was placed fourth in classification (App. 10a). No notice was given to respondents that an agreement had been entered into between the Company and the Union, no notice was given to respondents that the matter was being resubmitted to the arbitrator, and no one represented respondents' rights at this arbitration. This second arbitration, a rearbitration, took place despite the provision of the collective bargaining agreement that arbitration shall be "final and binding" (App. 29a, 39a).

Thereafter respondent Pasley did have an arbitration on the challenge to his fourth position in classification; he requested to appear at the arbitration but his request was denied. The grievant appeared, but the grievance was denied (App. 10a).

After these events, respondents prepared grievances challenging the second award, but the Union would not accept the grievances, would not sign the grievances or process them or place the matter of their treatment on the agenda of a Union meeting, nor would the Union grant respondents permission to

speak to the Union membership about their treatment (App. 11a, 30a).

In its Order on Petition For Rehearing,[4] the majority of the Appeals Court stated that the subsequent collaboration between the Company and the Union for the purpose of obtaining a modification of the previous arbitration award, without notice or opportunity to respondents to protect their rights, deprived them of valuable employment rights and constituted sufficient evidence for the jury to decide that the Union had breached its duty of fair representation to respondents and that the Company had breached its collective bargaining agreement (App. 3a).

The only instruction given by the trial court as to the liability of both the Company and the Union, the two parties against whom the jury brought back a verdict, contained only this approved resubmission issue (Tr. 557-558, *see* App. 36a). The Union here agreed that this was an approved submissible issue.

The Union made the following objection to all of respondents' verdict director instructions before the trial court:

> The objection of the defendant Union is that the verdict directors are inconsistent to the evidence, and they are stated in the disjunctive, they are inconsistent to the case law cited to the court in the Union's pretrial motions and brief, and they are inconsistent to the instructions previously given, and for those reasons we object (Tr. 510).

The Appeals Court affirmed the damage awards of the jury, which totaled $9,000.00, in favor of respondents Smith and

---

[4] The Order on Petition for Rehearing filed by the Appeals Court came about after the Company filed a Petition For Rehearing before the court en banc. The Union filed no petition for rehearing within the applicable time before the court en banc, but merely filed its petition after the court had passed on the Company's petition.

Pasley and against both defendants with the apportionment of 50% each from the Company and the Union (App. 3a, Tr. 568-569).

The jury also returned a special verdict in response to special interrogatories in favor of restoring respondents' seniority and classification to them. The trial court rejected the jury's advisory recommendation. The Appeals Court requested the District Court to reconsider the advisability of implementing the jury's recommendation (App. 3a, 38a).

Although the Company has been held liable by the Appeals Court, it has not petitioned for a Writ Of Certiorari here, and has informed the Clerk of this Court that it does not intend to file a response to the petition or otherwise participate in this cause.

## SUMMARY OF ARGUMENT

I.

The Appeals Court held that there was sufficient evidence for the jury to have found that the Union had breached its duty of fair representation and that the Company had breached its collective bargaining agreement on the issue of the resubmission by these parties of respondents' employment rights to the arbitrator.

Since only one instruction submitted to the jury would allow the jury to find both the Union and the Company liable on this single issue, and since the jury did find both the Union and Company liable, it is obvious that the jury only considered the verdict director instruction given by the trial court against both defendants in their verdict.

Since the record reflects the exact basis for the jury's verdict, and that basis was properly submitted, then the jury verdict must be upheld.

II.

The objection raised by the Union to respondents' verdict directors before the trial court was general, and did not specifically call the trial court's attention to the precise nature of the alleged error. Since the charge to the jury as to the Union contained correct propositions, the Union had to distinctly state the matter to which it objected and the grounds of its objection.

In this context, the Union may not benefit by a general objection to obtain a new trial.

## REASONS FOR DENYING THE WRIT

### I.

The instructions cited by petitioner solely relating to the Union have no relevance here for the verdict by the jury was against both the Union and the Company, based upon one instruction given by the court relating to the liability of both the Company and the Union. This instruction contained only one issue, the resubmission of respondents' employment rights to the arbitrator following the arbitrator's initial decision.[3] The Union concedes that this issue was properly submitted.

The Appeals Court en banc approved this proposition as a submissible issue to the jury. It held in its Order On Petition For Rehearing that the majority of the court determined:

> The subsequent collaboration between the employer, Hussmann Refrigerator Company, and the Union, for the purpose of obtaining a modification of the previous arbitration award, without notice or opportunity to junior

---

[3] This instruction in pertinent part states:

> Third, that the resubmission of the classifications to the arbitrator was a violation of the collective bargaining agreement since the first arbitration was final and binding on the parties; or if you find,
>
> Fourth, that the resubmission to the arbitrator deprived plaintiffs of their classifications or place in classification of Maintenance Pipe Fitter under the collective bargaining agreement since the Union and Hussmann agreed before the arbitration that the four senior men should hold the classification of Maintenance Pipe Fitter;
>
> . . .
>
> then your verdict should be for the plaintiffs and against defendants, Hussmann Refrigerator Company and United Steelworkers of America, Local 13889. (Tr. 557-558; *see* App. 36a)

> employees Smith, Pasley, and Serini to protect their rights, operated to deprive appellants of valuable employment rights and constituted sufficient evidence in this case for a jury to decide that the Union had breached its duty of fair representation to appellants and that the Company had breached its collective bargaining agreement. (App. 3a)

The evidence on the resubmission to the arbitrator as constituting a breach of the duty of fair representation as to the Union and a violation of the collective bargaining agreement as to the Company was so substantial that the Appeals Court found that there was collaboration between the employer and the Union; bad faith in the elements following the first arbitration up to and including the resubmission; failure of the Union to act in good faith; and complete abandonment of respondents by the Company (App. 3a, 39a, 40a).

There were three verdict forms submitted to the jury as to each of the respondents' claims for relief. One verdict form was for each respondent and against both defendants, Union and Company, with an apportionment of the damages to be paid by each which could be represented by percentages; another was a verdict form for each respondent against the Union solely; and the third, a finding in favor of both defendants (Tr. 564, 565).

The jury found in favor of respondent Charles W. Smith against both the Company and the Union for $6,500.00 and apportioned the sum of 50% against the Company and 50% against the Union, and found in favor of respondent John Pasley against the Company and the Union for $2,500.00 and apportioned the sum of 50% against the Company and 50% against the Union (Tr. 568, 569).

It is obvious that since the jury brought back a verdict against both the Company and the Union with its equal apportionment of damages, that the jury only considered the verdict director instruction given by the trial court against both defendants in their verdict. It is presumed that the jury followed the instruc-

tions correctly as they were given. *See Pittman* v. *Littlefield,* 438 F.2d 659, 662 (1st Cir. 1971); 9 C. Wright & A. Miller, *Federal Practice and Procedure:* Civil § 2558, at 668 (1971).

The Appeals Court decision is in total accord with decisions of this Court cited by petitioner. The record is clear and certain here that the sole basis for the jury verdict against the Company and the Union was the issue of the resubmission of respondents' employment rights to the arbitrator following the first arbitration award. No other issues were presented in the verdict director against the Company and the Union.

No question is raised here by the Union that the Appeals Court erred in holding that the Union's collaboration with the Company in resubmitting respondents' employment rights to the arbitrator was a submissible issue on its breach of its duty of fair representation and submissible as to the Company on its breach of the collective bargaining agreement.

The Company has not filed a petition for certiorari, it has informed the Clerk of this Court that it does not intend to file a response to the Union's petition. It has apparently accepted its liability under the decision of the Appeals Court that the issue of the resubmission was an appropriate one for the jury, and apparently accepted that the record supported the basis for the jury's verdict.

Further, the Company and not petitioner filed a Petition For Rehearing within the applicable time after the en banc decision. The Union filed its Petition For Rehearing only after the Appeals Court en banc had issued its order on the Company's petition.

It is clear that the question raised by the Union as to verdict directors directed solely to it was not an appropriate question to be presented here, that the record of the instruction directing liability as to the Company and the Union is the sole ap-

propriate charge, and that the verdict of the jury against the Company and the Union was based solely on this approved re-submission issue.

II.

Although Point I. above answers the question presented by the Union, respondents also comment on the form of objection raised by the Union to the verdict director instructions against the Union, although the instructions solely as to the Union, as pointed out *supra,* are not relevant items of discussion here.

The objection[6] raised by the Union's lawyer to respondents' verdict directors before the trial court was general, and no specific objections were made as required by Fed. R. Civ. P. 51. The attorney did not direct the trial court to the precise point of objection. *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U.S. 584, 596 (1884).

For at least 112 years, this Court has held that in a situation, such as here, where the charge as to the Union does contain propositions which are correct, and which the Union is not contesting here, the objecting party may not benefit by a general exception. *Lincoln* v. *Claflin,* 74 U.S. (7 Wall.) 132, 139 (1868).

In *Palmer* v. *Hoffman,* 318 U.S. 109, 119 (1943), this Court stated:

---

[6] The objection of the Union to the instructions of respondents:

> The objection of the defendant Union is that the verdict directors are inconsistent to the evidence, and they are stated in the disjunctive, they are inconsistent to the case law cited to the court in the Union's pretrial motions and brief, and they are inconsistent to the instructions previously given, and for those reasons we object (Tr. 510).

> In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial.

This Court stated in *Palmer* v. *Hoffman, supra* at 119, that this is a long standing rule of federal practice. *Pennsylvania R.R. Co.* v. *Minds,* 250 U.S. 368, 375 (1919); *Norfolk & Western Ry.* v. *Earnest,* 229 U.S. 114, 122 (1913); *McDermott* v. *Severe,* 202 U.S. 600, 611 (1906); *Beaver* v. *Taylor,* 93 U.S. 46, 54-55 (1876).

A perusal of the objection by the Union discloses that the trial court had no guidance from the Union as to any alleged specific error so that it could have been adequately informed.

The objection refers to no one individual item of error. This type of objection has the quality of placing the responsibility upon the trial court to examine the entire record for error. There was nothing in the objection from which the trial court could glean what error it had committed. Rule 51 and the law of this Court require that the responsibility rest with the attorney making the objection to state "distinctly the matter to which he objects and the grounds of his objection." Fed.R.Civ.P. 51.

The Union argues that there is no technical obstacle to remand, however, the record before this Court belies that claim.

## CONCLUSION

For the reasons set forth above, the Petition For A Writ Of Certiorari should be denied, and this Court should refuse to issue an order reversing and remanding the judgment of the Appeals Court.

Respectfully submitted,

LOUIS GILDEN
722 Chestnut Street
St. Louis, Missouri 63101
Attorney for Respondents